

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN EDWARD SHAFFER,

Defendant and Appellant.

D075130

(Super. Ct. No. RIF1501703)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

1. On page 17, delete the second sentence in the first full paragraph and replace it with the following:

"We note, however, this testimony by S.F. was in response to a question about the *details* of the second touching."

2. On page 17, delete the second full paragraph.

The petition for rehearing is denied.

There is no change in the judgment.

McCONNELL, P. J.

Copies to: All parties

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN EDWARD SHAFFER,

Defendant and Appellant.

D075130

(Super. Ct. No. RIF1501703)

APPEAL from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Affirmed.

Mark W. Fredrick and Cole M. Williams, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Shawn Edward Shaffer was convicted of 13 sex offenses against five young boys. On appeal, he claims insufficient evidence of five convictions;

ineffective assistance of counsel in the manner of cross-examining the witnesses; and insufficient notice of two counts. We reject his claims for the reasons stated below.

### BACKGROUND

Shaffer was convicted of the following crimes, listed by victim:

S.F.: two counts of committing a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)),<sup>1</sup> counts 1 and 2;

J.W.: oral copulation of a minor (§ 288a, subd. (b)(1)),<sup>2</sup> a lesser included offense of count 3 (oral copulation of a person under the age of 14 and more than 10 years younger than defendant (§ 288a, subd. (c)(1))); two counts of committing a lewd act on a child under 14 with force (§ 288, subd. (b)(1)), counts 4 and 5; committing a lewd act on a child 14 or 15 years old and more than 10 years younger than defendant (§ 288, subd. (c)(1)), count 6;

M.S.: committing a lewd act on a child 14 or 15 years old and more than 10 years younger than defendant (§ 288, subd. (c)(1)), count 7;

S.S.: committing a lewd act on a child under 14 (§ 288, subd. (a)), count 8;

S.L.: two counts of committing sodomy with a child under 16 (§ 286, subd. (b)(2)), counts 9 and 10; oral copulation with a child under 16 by a person over 21

---

<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> Section 288a was renumbered section 287 as amended by Stats. 2018, ch. 423 (Sen. Bill No. 1494), § 49, effective January 1, 2019. Count 3 refers to section 288a in effect between June 1, 2004 and September 1, 2006, as alleged in the Information.

(§ 288a, subd. (b)(2)),<sup>3</sup> count 11; and two counts of committing a lewd act on a child under 14 (§ 288, subd. (a)), counts 12 and 13.

The jury also found that Shaffer committed offenses against more than one victim within the meaning of section 667.61, subdivision (e)(4).

The trial court sentenced Shaffer to state prison for a total determinate term of six years four months followed by a consecutive indeterminate term of 75 years to life. Shaffer filed a timely notice of appeal.

### FACTUAL BACKGROUND

Shaffer's parents owned a company called UDC Corporation (UDC). Shaffer worked there all his life. Mr. S., the father of M.S. and S.S., was employed by UDC and was friends with Shaffer. Mrs. S. came to think of Shaffer as one of her best friends. In March 2004, when M.S. was 13 years old and his younger brother S.S. was 10 years old, the S. family went on a camping trip with Shaffer for the first time. Thereafter, they frequently went camping together for about three years from 2004 to 2008.

Shaffer, who lived alone, also invited the S. family over to his house. Shaffer had a large yard with a pool, hot tub and skate ramp. He also had a recreational vehicle, pool table, ping-pong table, radio-controlled cars, motorcycles, dirt bicycles, and other entertainment items. Shaffer was very friendly with M.S. and S.S. M.S. and S.S. went to

---

<sup>3</sup> Count 11 refers to section 288a that was in effect between July 21, 2008 and July 20, 2010, as alleged in the Information.

Shaffer's house every weekend when they were not camping because there were so many fun things to do there.

M.S. and S.S. invited along their neighborhood friends, S.F., J.W., C.G., S.L. and others. Shaffer, who was born in 1960, was about 44 years old when he started hosting the boys overnight. M.S. was born in 1990. He was the oldest of the boys and was 13 years old when he started spending a lot of time with Shaffer. His brother S.S. was born in 1994. J.W. was born in 1991 and was the first to regularly go to Shaffer's house with M.S. and S.S., starting when he was 12 years old. S.F. and C.G. were both born in 1993 and were a year older than S.S. S.F. began going to Shaffer's house when he was 13 years old. C.G. spent the night at Shaffer's house only once, when he was 12. S.L., who was born in 1994, was the youngest of the boys and started going to Shaffer's house on a regular basis when he was about 11 years old.

The boys all told similar stories at trial. When Shaffer and the boys were alone at the house, Shaffer told them to swim naked or to take their swim trunks off when they went in the hot tub. Shaffer also told them to shower in pairs when they got out of the hot tub. He either watched them shower or joined them in the shower and helped to wash them or told them to wash each other. Shaffer often tugged or flicked their penises and commented on the size of their penises while they were showering.

In the evenings, Shaffer played pornographic movies for the boys. He told them to take off their pants and to masturbate while watching movies. Shaffer watched the boys masturbate and eventually he masturbated the boys while they watched the movies.

Each victim testified to the details of the sexual abuse he suffered.

*Counts 1 and 2: Shaffer Touched S.F.'s Penis Twice When S.F. Was Under the Age of 14 Years Old*

S.F. testified that he went to Shaffer's house most weekends over the span of eight months to a year. S.F. first spent the night at Shaffer's house when he was 13 years old, along with M.S., S.S. and J.W. Shaffer suggested that the boys all go into the hot tub naked. This did not sound right to S.F., but he went along with it because he did not want to be the odd one out. Afterward, Shaffer told S.F. and S.S. to shower together. Shaffer washed S.S., including his penis. The boys and Shaffer watched a pornographic movie. S.S. and J.W. each masturbated.

S.F. spent the next weekend at Shaffer's house as well. The same activities occurred in the evening—sitting naked in the hot tub, joint showers, and watching a pornographic movie. This time, S.F. masturbated while watching the movie as the other boys did. Shaffer commented on S.F.'s penis then grabbed S.F.'s penis and stroked or massaged the head of S.F.'s penis for about three seconds. S.F. told Shaffer he was uncomfortable with Shaffer touching his penis. Shaffer tried to convince him that this was common among men. S.F. did not tell his parents because he felt inexperienced, scared and alone. He questioned his sexuality and felt that he would be judged. At the time, M.S., S.S., and J.W. were the only friends he had and he did not want to lose contact with them.

Shaffer groped S.F. a second time when S.F. was masturbating while watching a pornographic movie with the other boys. S.F. described Shaffer reaching over and grabbing S.F.'s penis, squeezing it, and letting his fingers drag along S.F.'s penis while

pulling his hand away. S.F. said he was "in the transition time between 13 and 14 or 14." The prosecutor asked him to remember his age. S.F. said he was under 14 years old this second time that Shaffer touched him. Four years before trial, in 2013, S.F. told a detective that he was under 14 when Shaffer touched his penis.

In the years following Shaffer's abuse, when S.F. was between the ages of 14 and 16, his grades plummeted, and he began experiencing anxiety, depression, lack of sleep, stomach problems and vomiting. S.F. became addicted to drugs, including heroin, in his later teen years. He stole to support his drug habit and had two theft convictions. At the time of trial, he had been off heroin for two years.

In early 2012, J.W. told his aunt about Shaffer. His aunt called S.F.'s mother and suggested she ask S.F. about Shaffer. S.F.'s mother asked him if Shaffer had done anything to him. S.F. denied anything happened because he was not ready to talk about the abuse. He told his mother about the abuse a few months later, however, because he wanted to assure his parents that they were good parents, and that his drug addiction and other bad behavior was not due to anything they had done. He was crying and withdrawing into himself when he told his mother. Ten years after the abuse, at the time of trial, S.F. said it "hurts my stomach. It hurts everything . . . [to remember those] fucked-up images. They're something that children shouldn't have to see."

An attorney contacted S.F. about a civil lawsuit against Shaffer. S.F. joined the lawsuit. He testified he was not making up the descriptions of abuse to get money from Shaffer. He wanted justice.

*Counts 3, 4, 5 and 6 - Shaffer Orally Copulated J.W.; Twice Grabbed J.W.'s Penis by Force or Fear When J.W. Was Under the Age of 14; and Committed a Lewd Act on J.W. When J.W. Was 14 or 15 and Shaffer Was More Than 10 Years Older*

J.W. was described as "short and chubby" when he was 12 years old and started spending time with Shaffer. He was about four feet five inches tall. His mother died when he was five years old. He lived with his father and stepmother, but was raised mostly by his aunt and uncle, who lived across the street from his house. J.W. was one of the first friends to be taken to Shaffer's house, as he was "pretty much at [the S.] house on a daily basis. . . . He went everywhere with [the S. family]." Mrs. S. identified a picture of J.W. at Vail Lake when he was "twelve-ish."

The joint showers, pornographic movies and sexual touching began soon after J.W. started going to Shaffer's house. Shaffer forced J.W. to masturbate him when J.W. was 13 to 14 years old. Shaffer grabbed J.W.'s hand and put it on Shaffer's penis. J.W. did nothing so Shaffer held J.W.'s hand and moved it up and down on Shaffer's penis. J.W. communicated to Shaffer that he did not want to be touched or masturbated. He was fidgety, threw his leg up, and showed by body language that he did not want to participate. Against J.W.'s resistance to being touched, Shaffer grabbed J.W.'s penis and masturbated him more than 25 times before J.W. turned 14. J.W. always indicated by body language he did not want to participate.

Shaffer orally copulated J.W. about 10 times, against his will, including five times before he turned 14. These instances occurred at Shaffer's house and when camping, including in the Jeep at Vail Lake and in the Jeep at Ocotillo Wells. Shaffer's sexual



assaults of J.W. stopped only when J.W. was 15 years old and he no longer spent time with Shaffer.

J.W. described a camping trip to Vail Lake that he made with Shaffer and the S. family when he was 13 years old. The S. family went off in their Jeep, leaving J.W. alone with Shaffer. Shaffer let J.W. drive his Jeep. At some point J.W. spilled soda on his clothes. Shaffer told him to take his clothes off so that he would not get soda all over the Jeep. J.W. did not want to drive naked, but did so out of fear. J.W. felt that he had to do what Shaffer told him to do. Shaffer told J.W. to masturbate while driving and J.W. complied. Shaffer touched J.W.'s penis, and grabbed J.W.'s hand and put it on Shaffer's penis, over his clothes. Shaffer panicked when they got back to the campsite and saw that the S. family was there. He told J.W. to hurry and put his clothes back on.

J.W. testified about a time when he was 14 and Shaffer called him into his bedroom early one morning. J.W. went to Shaffer's bedroom although he did not want to go. Shaffer touched his own penis and told J.W. to masturbate, and to masturbate Shaffer. J.W. said he did not want to. Shaffer grabbed J.W.'s hand and put it on Shaffer's penis. J.W. pulled his hand back and scooted away from Shaffer, showing by his body language that he did not want to be touched. Shaffer put his mouth on J.W.'s penis and orally copulated him for a couple of minutes. Shaffer told J.W. to orally copulate Shaffer, but J.W. refused.

J.W. became addicted to heroin and painkillers to cover up his physical and emotional pain. He stole to get money to buy drugs and had theft convictions. He had not used drugs for about four months before trial.

J.W. told his aunt and uncle about the sexual assaults in early 2012. He was inconsolable, curled up in a fetal position, crying, and utterly in pain. A police detective interviewed him in 2013 but did not follow up on this investigation, until M.S., S.S. and S.L. reported the crimes in 2015.

J.W. explained that he minimized the sexual assaults when talking to the police detective and through the beginning of his testimony because he was too embarrassed to talk about the abuse in front of people. Both when talking to the officer and in court, J.W. was reluctant to admit how many times Shaffer assaulted him.

J.W. had no civil lawsuits against Shaffer.

*Count 7 - Shaffer Committed a Lewd Act on M.S. When M.S. was 14 or 15 Years Old and More Than 10 Years Younger Than Shaffer*

M.S. testified he was 13 when he met Shaffer, and from then on he went to Shaffer's house or camping with him almost every weekend for about four years. He testified that one time, Shaffer tried to wash him in the shower, and that Shaffer tugged his penis with two fingers and his thumb. Another time when the boys and Shaffer were watching a pornographic movie, M.S. moved into the kitchen to masturbate in private. Shaffer grabbed M.S.'s penis and told him to go sit on the couch with the other boys. M.S. also testified that Shaffer touched M.S.'s penis in the hot tub.

M.S. did not tell his parents about the abuse when it occurred because he was terrified of their reaction and what could happen to his father's job, as it was the only job his father ever had. M.S. told his parents in 2015, after S.S. told them that Shaffer had

abused him. M.S. broke down, cried, bawled and raged when telling his parents about the abuse.

M.S. was a plaintiff in a civil lawsuit against Shaffer. He testified that his testimony was not influenced by the suit.

*Count 8 - Shaffer Committed a Lewd Act on S.S. When He Was Under 14*

S.S. was 10 years old when he began going to Shaffer's house regularly. He saw his first pornographic film at Shaffer's house. During movie time, Shaffer would rub S.S.'s penis with his hand to get it hard, starting when S.S. was 10. Shaffer masturbated S.S. at least 50 times through the years. S.S. had to take showers with other boys and Shaffer. During the showers, Shaffer would "continuously touch" and "flick our peckers."

S.S. said that he sometimes went into Shaffer's bedroom with him. S.S. said he only let Shaffer masturbate him, nothing else. Shaffer also masturbated S.S. in the motorhome when camping. The masturbation by Shaffer started when S.S. was 10 and went on until he was 14 or 15 years old.

Some of the other boys saw Shaffer's abuse of S.S. One time when M.S. was not present, J.W. saw Shaffer masturbate S.S. while they were watching a pornographic movie. S.S. was naked, lying across Shaffer's lap as Shaffer sat on the couch. M.S. saw Shaffer tug on the penises of the younger boys, S.S. and S.L., when they were about 11 years old. M.S. also saw Shaffer take S.S. and J.W. individually into his bedroom when S.S. was 10 or 11 years old, and J.W. was 12 or 13 years old. S.L. saw Shaffer touch S.S.'s penis in the hot tub.

S.S. told his parents about the assaults in 2015. He was crying and slobbering, his nose was running, he was blurting everything out, slurring his words and could barely get his words out because he was talking so fast. The family later went to the police, and brought S.L. along. An officer interviewed S.S. in 2015. S.S. testified that he did not tell the truth to the officer because he felt uncomfortable telling another man about the extent of the abuse. The statement he gave to the police was "very wrong" and inaccurate in that he did not describe the full extent of the abuse. S.S. was afraid that the officer would judge him based on what happened in the past.

S.S. was suing Shaffer for money. He said he was more interested in prosecuting Shaffer, however, than in getting money from Shaffer.

*Counts 9, 10, 11, 12 and 13: Shaffer Twice Sodomized and Once Orally Copulated S.L. When S.L. Was Under 16 and Twice Committed Lewd Acts on Him When S.L. Was Under 14*

S.L. was the youngest child of the group of boys, about six months younger than S.S. He lived with his mother; his father was absent from his life. His mother moved frequently, uprooting S.L. S.L. lived in the neighborhood of M.S., S.S., J.W. and S.F. for about a year, when he was nine or 10, and became friendly with the boys. He moved to Menifee the following year. After he moved away from the neighborhood, when he was about 11, the S. family introduced S.L. to Shaffer and took him to Shaffer's house. He went camping with Shaffer or to Shaffer's house every weekend for a couple of years from then on. Shaffer drove to Menifee to pick up S.L. every weekend and drove him to Shaffer's house in Corona.

A few months after his first visit to Shaffer's house, Shaffer started touching S.L. S.L. was 11-1/2 or 12 years old when the sexual abuse started. Shaffer touched and stroked S.L.'s penis multiple times when they were both naked in the hot tub. Shaffer also frequently touched and stroked S.L.'s penis with his hand in the shower, and masturbated the boys, including S.L., when they watched pornographic movies. By the time S.L. was 13, there was little or no more masturbation while watching pornography.

S.S. testified that he saw Shaffer touch S.L. sexually through the ages of 10 to 14 years old. This occurred in different places: in the living room, in the office, in the shower, outside of the house, and while camping.

When S.L. turned 14, he moved into Shaffer's house because it was more stable than living with his mother. Shaffer took care of S.L. S.L. thought of Shaffer as a father. M.S., S.S., J.W., and S.F. had all stopped going to Shaffer's house before S.L. moved in. S.L. lived with Shaffer for a year and a half. During this time, Shaffer continued to sexually touch S.L.'s penis while in the hot tub and in the shower.

Shaffer sodomized S.L. twice, both times when S.L. was 14 years old. The first time occurred in Shaffer's bedroom after S.L. had been living with him for four or five months. Shaffer put his penis inside S.L.'s anus for two or three minutes. The second time occurred about a month later when Shaffer and S.L. were cleaning the motorhome in the garage. Shaffer again put his penis inside S.L.'s anus for more than two minutes. The penetration hurt both times, and S.L. had bleeding afterwards.

Shaffer orally copulated S.L. when S.L. was 14 years old. In the bedroom, S.L. put his mouth on Shaffer's penis and Shaffer put his mouth on S.L.'s penis. In 2015, S.L.

told a detective that Shaffer orally copulated him three times a week for about two years.

S.L. moved back with his mother in Barstow or Victorville after about a year and a half at Shaffer's.

S.S. called S.L. in 2015 and talked with S.L. about going to the police. S.L. testified he went to the police because what happened was not right. Someone from a law firm later called S.L. and told him about the civil lawsuit against Shaffer. S.L. joined as a plaintiff in the suit. He knew that he was suing Shaffer but was not aware of the details. S.L. had not talked to anyone in the S. family or to S.F. about the suit. S.L. said that he was not making these claims against Shaffer to obtain money.

#### *Additional Information*

C.G. was the same age as S.F. and was friends with S.F., S.L., M.S., S.S., and J.W. When he was about 12 or 13 years old, he went to Shaffer's house three to four times per month for about three to five months. He went camping with Shaffer and the S. family once.

C.G. testified that at Shaffer's home, Shaffer told the boys to take their shorts off after swimming. C.G. was apprehensive, but S.S. told him that all the boys did it. C.G. also found it not normal that Shaffer told the boys to shower together.

C.G. spent the night at Shaffer's house only once. That night, Shaffer put on a pornographic movie and told the boys to take their pants off and masturbate. C.G. left the room. He never went back to Shaffer's house.

R.W. also testified. His father, like Mr. S., worked at UDC , and his family was very friendly with the S. family. R.W. went camping with the S. family and Shaffer

occasionally. Once when R.W. took a shower in Shaffer's motorhome and got out of the shower, Shaffer was standing nearby with a towel, but did not give the towel to R.W. Instead, Shaffer commented on R.W.'s penis and told the other boys, M.S. and S.S., to look at R.W.'s penis. R.W. told Shaffer that comment was inappropriate.

## DISCUSSION

### 1. *Sufficient Evidence Supports Counts 1, 2, 4, 5, and 13*

Shaffer contends that there was insufficient evidence that he committed two lewd acts on S.F. when S.F. was under the age of 14 (counts 1 and 2); that he twice lewdly touched J.W. with force or fear when J.W. was under 14 (counts 4 and 5); and that he committed a lewd act on S.L. when S.L. was under 14 (count 13). We disagree.

#### A. *Legal Principles*

On review for sufficient evidence we apply a well-settled standard. "[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 638 (*Jennings*); *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 (*Jackson*).) "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating

evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) " 'Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.' " (*People v. Brown* (2014) 59 Cal.4th 86, 106 (*Brown*).)

In support of his claims of insufficiency of evidence, Shaffer relies on the evidence most favorable to him and points out inconsistent statements made by the witnesses. His arguments are neither persuasive nor in compliance with the well-known rules of review of sufficiency of evidence. (See, e.g. *Jennings, supra*, 50 Cal.4th at pp. 638–639; *Jackson, supra*, 443 U.S. at pp. 318–319; *Brown, supra*, 59 Cal.4th at p. 106.)

The response of the Supreme Court in *Brown* to an argument similar to Shaffer's is apt: "Defendant argues at length that witnesses testifying about these statements were untrustworthy, had given inconsistent statements, had delayed reporting, and were drug users. The jury heard the direct testimony and extensive cross-examination of each witness. It heard evidence from rebuttal witnesses. The credibility question was vigorously argued. The final determination as to the weight of the evidence is for the jury to make. We do not reweigh it and substitute our view for theirs." (*Brown, supra*, 59 Cal.4th at p. 106.)

The jury heard inconsistent statements from the witnesses and determined which statements were true and which were not. We have examined the claims and found none



that were physically impossible or inherently improbable. We have no power to overturn the jury's credibility findings. (*Brown, supra*, 59 Cal.4th at p. 106.)

*B. Counts 1 and 2, Lewd Touching of S.F. When He Was Under 14*

Lewd touching of a minor under the age of 14 requires proof of the minor's age at the time of the touching. (§ 288, subd. (a).) S.F. testified first that he was "probably 13 or 14" when the first touching happened. After giving it "a lot of thought," S.F. said definitively that he was 13 years old when Shaffer touched his penis. Similarly, he said that he was "in the transition time between 13 and 14 or 14" at the time of the second touching but then confirmed that he was under 14. Four years before trial, S.F. told an officer that he was under the age of 14 when Shaffer touched him.

Shaffer points out that there was conflicting information about S.F.'s age when Shaffer touched S.F.'s penis. The evidence in support of a jury's verdict is not insufficient just because the evidence is conflicting. The jury resolved the conflicting testimony by accepting beyond a reasonable doubt S.F.'s testimony that he was 13 both times Shaffer lewdly touched him. We cannot second-guess the jury's finding. We cannot reweigh the evidence, reevaluate S.F.'s credibility, or reverse the convictions. (*Brown, supra*, 59 Cal.4th at p. 106; *Jennings, supra*, 50 Cal.4th at p. 639.)

Shaffer also argues that there was insufficient evidence to show that he lewdly touched S.F. twice. He points to the evidence most favorable to himself—that S.F. initially said he was touched only once. After reviewing his 2013 statement to a police officer, however, S.F. said that his memory was refreshed and that he had been touched a second time. Further, he described Shaffer's acts in detail. S.F. said that the first time

Shaffer touched his penis, Shaffer commented on it, then grabbed it and stroked or massaged the head for about three seconds. The second time Shaffer "groped" his penis, the boys were again masturbating while watching pornography. Shaffer made a "reach, grab, squeeze motion. And that's coming off, like, lightly letting go, but keep dragging your fingers across . . . ." The description of the second touching was markedly different from the description of the first touching, supporting the jury's finding that Shaffer lewdly touched S.F. twice.

Appellate counsel claims that after testifying that he was touched twice, S.F. said, "I'll be honest, I don't remember." Counsel has taken this quote completely out of context. S.F. said he "could not remember" in response to a question about whether Shaffer had an erection when he touched S.F.'s penis. The question and answer were:

"Q.: Did you notice if [Shaffer] had an erection at the time?"

"A.: I'll be honest. Right now, I don't remember."

Counsel's assertion that S.F. said he could not remember the second touching misstates the record. Further, in his reply brief, appellate counsel quoted S.F. as saying that he "really has no memory of that particular episode." This purported quote is not in record.

We review the record in the light most favorable to the judgment and find sufficient evidence supports the jury's finding that Shaffer lewdly touched S.F. two separate times, and that S.F. was under the age of 14 both times. (*Brown, supra*, 59 Cal.4th at pp. 105–106; *Jennings, supra*, 50 Cal.4th at pp. 638–639.)

*C. Counts 4 and 5, Lewd Touching of J.W. With Force or Fear When He Was Under 14*

Shaffer contends there was insufficient evidence of force or fear to support the jury's findings in counts 4 and 5 that Shaffer committed two lewd acts on J.W. with force or fear. Sufficient evidence of duress supports the jury's findings.

Section 288, subdivision (b), prohibits lewd acts "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." (§ 288, subd. (b).) Duress as used in the statute can be committed by use of threats, psychological pressure, or intimidation sufficient to " ' "coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." ' " (*People v. Soto* (2011) 51 Cal.4th 229, 246 (*Soto*), emphasis omitted.) Because duress involves psychological coercion, relevant factors include the relative size and age between the defendant and the victim, a position of dominance and authority, and the isolation of the victim. (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) J.W. was 12 or 13 years old and of short stature; Shaffer was over 40. Shaffer was in a position of authority and dominance when J.W. was at Shaffer's house and in his motorhome, particularly when J.W. was alone with Shaffer in Shaffer's bedroom and on camping trips.

J.W. testified that each of the multiple times Shaffer grabbed J.W.'s penis before he was 14, J.W. was fidgety, threw his leg up, and generally showed, by his body language, that he did not want to be touched or masturbated. He testified that Shaffer

orally copulated him about five times, against his will, before he turned 14, when J.W. was alone with Shaffer at his house and when camping, including in the Jeep at Vail Lake and in the Jeep at Ocotillo Wells. J.W. explained the duress and coercion that he felt when left alone with Shaffer at Vail Lake and Shaffer made him take his clothes off in the Jeep. He stated that "[i]t was one of those things where, you know, that if you don't . . . comply, that it's gonna possibly go the other way and not be good. [¶] So, once again, like out of fear, you know, I did." J.W. said he felt that he had to do what Shaffer told him to do.

J.W.'s testimony supported the jury's finding that Shaffer used duress to " ' "coerce a reasonable person of ordinary susceptibilities to . . . acquiesce in an act to which one otherwise would not have submitted." ' " (*Soto, supra*, 51 Cal.4th at p. 246.) His testimony was neither physically impossible nor inherently improbable and was sufficient by itself to support the conviction. (*Brown, supra*, 59 Cal.4th at p. 106.)

*D. Count 13, Lewd Touching of S.L. When S.L. Was Under 14*

Shaffer claims there was insufficient evidence that he lewdly touched S.L. more than once before S.L. turned 14, count 13. Shaffer makes this argument, again, by mischaracterizing the record, asserting that S.L. testified to being touched only once before he moved in with Shaffer when S.L. was 14.

S.L. testified that from the time he was 11-1/2 or 12, Shaffer touched and stroked S.L.'s penis multiple times in the hot tub; Shaffer frequently touched and stroked S.L.'s penis when S.L. was in the shower; and Shaffer masturbated S.L. numerous times while they watched pornographic movies. S.L.'s testimony as a whole and in context supported

the jury's finding that Shaffer lewdly touched S.L. more than once when S.L. was under 14 years old.

## 2. *Ineffective Assistance of Counsel*

Shaffer contends his counsel was constitutionally ineffective for failing to conduct adequate cross-examination of, investigate, or emphasize the purported financial motivation of the four victims who have filed a civil lawsuit against Shaffer. We find neither deficient performance nor prejudice.

" ' "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington* [(1984)] 466 U.S. 668, 694 [*Strickland*].)" ' [Citation.]" (*People v. Rices* (2017) 4 Cal.5th 49, 80.) "In reviewing a claim of ineffective assistance of counsel, we give great deference to counsel's tactical decisions." (*People v. Johnson* (2015) 60 Cal.4th 966, 980.) We presume that counsel's performance fell within the wide range of professional competence unless the defendant shows otherwise. The defendant has the burden of presenting evidence showing what information could have been discovered and showing that the additional information would have created a reasonable probability, not just a possibility, of a more favorable result. (*People v. Carrasco* (2014) 59 Cal.4th 924, 983–991 (*Carrasco*).) Conclusory allegations are not sufficient. (See *In re Reno* (2012)

55 Cal.4th 428, 469, 493 [vague and conclusory claims, not supported by persuasive factual allegations, are not sufficient to show error].)

S.S., M.S., S.L. and S.F. all testified that they had filed a civil lawsuit against Shaffer.<sup>4</sup> They also testified that they were more interested in justice from Shaffer than money and their testimony was not influenced by the suit. Defense counsel argued during closing argument that these four victims had a financial incentive to lie about their criminal allegations to support their civil lawsuit.

Shaffer's claim fails on both prongs of ineffective assistance. He cannot show deficient performance. Four of the five victims told the jury that they were suing Shaffer for money, and defense counsel argued they had a financial motivation to lie. Shaffer has not shown what other information defense counsel would have found or elicited with further investigation or cross-examination. Conclusory allegations are not sufficient. Because he cannot show what additional evidence could have been produced, Shaffer cannot show any likelihood of a more favorable result if his counsel had acted differently. (*Carrasco, supra*, 59 Cal.4th at pp. 983–991; *Reno, supra*, 55 Cal.4th at pp. 469, 493.) Moreover, the testimony of J.W. and C.G., who were not suing Shaffer, corroborated the acts described by S.S., M.S., S.F. and S.L. Shaffer has not shown incompetence of counsel.

---

<sup>4</sup> J.W. did not sue Shaffer.

### 3. *Notice of Charges*

Shaffer further contends that he was denied the due process right to notice of the charges against him. He asserts that even though he had notice that he had been charged with two counts of committing lewd acts on J.W. with force or duress, his rights were violated because the prosecution "altered" its theory of the crimes, thereby depriving him of notice of the acts.

The right to due process of law requires that one accused of a crime must be advised of the nature and cause of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered against him at trial. (*People v. Jones* (1990) 51 Cal.3d 294, 317 (*Jones*); *People v. Fernandez* (2013) 216 Cal.App.4th 540, 554 (*Fernandez*).) In cases involving sexual molestation of children, the function of the accusatory pleading is to give notice to the defendant of the nature of the offense charged and whether it occurred within the applicable limitations period. (*Jones*, at p. 317; *Fernandez*, at p. 555.) Notice of the specific time and place of the commission of the acts is not necessary because time and place are not elements of the crime. (*Jones*, at p. 317; *Fernandez*, at pp. 554–555.)

As J.W. testified, he minimized the sexual assaults when talking to the detective. The detective's testimony at the preliminary hearing was brief, lacking detail. Detective Andy Bryant testified at the preliminary hearing that J.W. told him that Shaffer would take J.W.'s hand and put it on Shaffer's penis and "he [i.e., J.W.] didn't want to do that, but he did do that three times out of fear." This testimony gave sufficient notice to

Shaffer of the nature of the charges of committing lewd acts with force, duress or fear. (*Jones, supra*, 51 Cal.3d at p. 317; *Fernandez, supra*, 216 Cal.App.4th at pp. 554–555.)

Bryant's testimony also gave notice of the time period during which these crimes occurred. He testified that J.W. said Shaffer touched him sexually every weekend for a month in the summer when he was 13 and orally copulated him about 10 times between the summer he was 13 and the summer he was 14. J.W. specifically told the officer that he was 13 during one of the times that he had to masturbate Shaffer.

When multiple sexual offenses against a child occur over a period of time, and especially when the trial is several years later, much of the evidence may be generic, that is, not well differentiated in the testimony by the victim. In such cases due process requires that the defendant be given notice of the nature of the charges against him sufficient to give him a reasonable opportunity to prepare and present a defense against the charges, and sufficient notice of the time period in which the act or acts occurred so that he could assert any limitations defense that was applicable. (*Jones, supra*, 51 Cal.3d at p. 317; *Fernandez, supra*, 216 Cal.App.4th at pp. 554–555.) Shaffer received this notice from Detective Bryant's testimony at the preliminary hearing.

Shaffer had no right to specific notice of the time, place, and circumstances of the offenses. (*Jones, supra*, 51 Cal.3d at p. 317.) Shaffer did not object when J.W. testified that Shaffer grabbed J.W.'s hand and put it on Shaffer's penis while J.W. was driving the Jeep naked. Nor did he request additional time to prepare a defense to this incident. Once J.W. described that event, Shaffer had notice of the specific circumstances of one of his lewd touchings of J.W. by force or fear. Further, Shaffer's defense was a full denial



that he committed any sexual offenses against any of the children. He did not address this incident during his testimony but broadly asserted that he had no sexual encounters with the boys at all. No error occurred.

#### DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.